

SUPREME COURT, STATE OF COLORADO

Case No. 93 SA 17

BRIEF AMICUS CURIAE OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Appellants.

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SUPREME COURT, STATE OF COLORADO
Case No. 93 SA 71

BRIEF AMICUS CURIAE OF AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO AND COLORADO COUNCIL 76, AMERICAN
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ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiff-Appellees,

v.

ROY ROMER as Governor of the State of Colorado and GAIL NORTON AS
Attorney General of the State of Colorado, and the STATE OF
COLORADO,

Defendants-Appellants,

INTEREST OF AMICUS

The American Federation of State, County and Municipal
Employees, AFL-CIO (hereinafter "AFSCME") is a labor union
consisting of over 1.3 million members. In Colorado, AFSCME
Council 76 (hereinafter "Council 76") represents over three
thousand two hundred public employees at the state and local
levels. Council 76 has offices located in Denver and Pueblo.

AFSCME's membership, including its Colorado membership, is
highly diverse. Our members include individuals of all races,
religions, ethnicity, gender and sexual orientation. AFSCME's

gay and lesbian members play an active and important role in the Union. Tolerance and respect for our diverse membership is an abiding principle within AFSCME. Indeed the very first provision of the Bill of Rights for Union Members included in the AFSCME Constitution provides:

No person otherwise eligible for membership in this union shall be denied membership, on a basis of unqualified equality, because of race, creed, color, national origin, sex, age, sexual orientation, disability or political belief.

AFSCME International Constitution, Bill of Rights for Union Members, p. 8, para. 1. (Emphasis added).

AFSCME is a party to thousands of collective bargaining agreements, with public employers, including agreements in Colorado. In many of these agreements there are provisions prohibiting discrimination based upon sexual orientation. In Colorado AFSCME has planned and intends to negotiate such provisions with public employers. Indeed, in one jurisdiction, AFSCME and a public employer have tentatively agreed to the inclusion of a provision prohibiting sexual orientation discrimination. If Amendment 2 becomes the law, AFSCME will not be able to negotiate such provisions. Furthermore, Amendment 2 will interfere with labor/management relationships by prohibiting bargaining over matters of concern to our gay, lesbian and bisexual members. Finally, Amendment 2 would prevent AFSCME from enforcing existing contractually mandated grievance and arbitration procedures on behalf of gay, lesbian and bisexual

members who are subject to disciplinary actions, including termination, due to their sexual orientation.

There are currently laws and regulations in Colorado that prohibit discrimination based on sexual orientation. These laws and regulations protect gay, lesbian and bisexual public employees, including AFSCME members. Among other laws and regulations, there is an Executive Order promulgated by the Governor, dated December 10, 1990, which prohibits discrimination based upon sexual orientation. Furthermore, the State of Colorado has promulgated rules which prohibit sexual orientation discrimination.^{1/} The Career Service Rules for the City and County of Denver prohibit discrimination based upon sexual orientation.^{2/} The City of Aurora has also promulgated regulations prohibiting sexual orientation discrimination.^{3/} The Denver Housing Authority has established a rule prohibiting sexual orientation discrimination.^{4/} These regulations and policies which currently protect AFSCME members will be nullified if Amendment 2 becomes the law.

^{1/} Code of Colorado Regulations, 4 CCR 801-1, policy 11-1.

^{2/} Career Service Rules of the City and County of Denver, Rule 19.

^{3/} City of Aurora Personnel Policies and Procedures, Sections 1-2 and 1-4.

^{4/} Denver Housing Authority Policy and Procedure Manual, Section 3.2.1.

If Amendment 2 is enforced, AFSCME's gay, lesbian and bisexual members will become targets for discrimination based on their sexual orientation and will be subject to unjust and improper discrimination without legal, legislative or regulatory recourse. Under Amendment 2 employers will be able to terminate, discipline, transfer to less desirable work, fail to promote and engage in other reprisals against AFSCME's gay, lesbian and bisexual members, with complete impunity. The end result will be that able employees will be subject to being treated in an irrational, prejudicial manner, and the efficiency of the work force will suffer.

In the name of that for which our Nation stands: for strength based upon tolerance and diversity, for the protection of minority beliefs and persons against the tyranny of the shifting majority, for our national commitment that every individual should be judged on his or her own merit and be given the opportunity to succeed, AFSCME submits this Amicus Brief, and urges the Court to affirm the decision of the District Court enjoining the effectuation of Amendment 2.

SUMMARY OF THE ARGUMENT

If given effect Amendment 2 would unconstitutionally interfere with public employees' right of access to the Colorado courts. However, aside from the constitutional questions, Amendment 2 would destroy decades of public and private employment law developments which have led to an increasingly

merit based system, accompanied by greater workplace efficiency, productivity and fairness.

ARGUMENT

I. AMENDMENT 2 UNCONSTITUTIONALLY INTERFERES WITH THE PLAINTIFFS' RIGHT OF ACCESS TO THE COLORADO COURTS

Under the plain wording of Amendment 2, if the provision becomes effective, Colorado courts can no longer hear and enforce state employment policies and labor agreements which prohibit sexual orientation discrimination (such as those described above). Those policies and agreements reflect Colorado state employer-employee relationships. However, while they may be set out under state procedures and contracts, they frequently result in guaranteeing the employee certain federal constitutional rights. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Amendment 2 would unconstitutionally interfere with the right of protected employees who are subjected to wrongful sexual orientation discrimination to gain access to the Colorado courts in an attempt to enforce their federal constitutional claims. This limitation is a direct violation of the United States Constitution's Supremacy Clause, which guarantees access to state courts to pursue such claims.

"The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is...subject to the restrictions imposed by the Federal Constitution." McKnett v. St. Louis &

S.F.R. Co., 292 U.S. 230, 233 (1934). See Angel v. Bullington, 330 U.S. 183, 188 (1947) (a state "cannot escape its constitutional obligations by the simple device of denying jurisdiction to Courts otherwise competent.") (citation omitted). The Colorado Supreme Court has recognized and adopted this general analysis. See, e.g., Marworth, Inc. v. McGuire, 810 P.2d 653, 657 (Colo. 1991).

Given the circumstances of each case, the U.S. Supreme Court has rested its rulings in this area on any one of a number of constitutional guarantees.^{4/} Most recently, in Howlett v. Rose, 496 U.S. 356 (1990), the Court made it clear that under the Supremacy Clause of Article VI^{5/} states courts are required to hear claims alleging the violation of federal constitutional rights under 42 U.S.C. § 1983. Howlett, 496 U.S. at 380-81.

Amendment 2 would prohibit Colorado courts from hearing those claims. Accordingly, this amicus and all of its members will suffer a violation of their fundamental constitutional right of access to the courts, if Amendment 2 is allowed to go into effect. The people of Colorado cannot amend -- by their vote alone -- the terms of the United States Constitution.^{6/}

^{4/} Bullington references not only the Contract Clause, but also the Full Faith and Credit Clause and the Privileges and Immunities Clause. 330 U.S. at 188.

^{5/} "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land." U.S. Const., art. VI.

^{6/} The defendants acknowledge that the state judicial system
(Continued)

II. AMENDMENT 2 IS IN CONFLICT WITH THE EVOLUTION OF EMPLOYMENT LAW WHICH REQUIRES THAT EMPLOYMENT DECISIONS BE BASED UPON MERIT AND NOT STATUS

Amendment 2 is profoundly inconsistent with the evolution of employment law and practice in this country, and with rational and efficient decisionmaking in the workplace. Since the passage of civil service laws at the beginning of this century, there has been a steady evolution in employment law under which employment decisions are properly based on the merit of the individual employee, and not on his or her status. Under existing law, government employment decisions, such as decisions to hire, to transfer, to promote, to discipline or to fire an employee, are properly based upon the employee's ability to perform the work and not upon other characteristics that are not work-related.^{7/} This merit based reform has worked to rationalize the workplace so that the most able employees are selected for hire, promotion and the most responsible job duties. Such a system provides for a more efficient workplace and for fairer employment practices.

Amendment 2 is in conflict with the merit based evolution of American employment law. Amendment 2 would permit employment decisions based on sexual orientation, rather than on ability to

must hear the federal claims that Amendment 2 attempts to eliminate from the state docket. Op.Brff. at 13. This is an admission of Amendment 2's unconstitutionally.

^{7/} In some cases this rule is constitutionally mandated. See Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).

perform the work. Amendment 2 will wreak havoc with efficient and fair employment practices and will undermine the efforts of employers in both the public and private sector to make the best use of the most able employees.

A review of various areas of employment law clearly demonstrates the modern evolution toward merit based employment decisions and demonstrates that Amendment 2 is fundamentally inconsistent with this evolution.

A. The Public Sector--Civil Service Laws

Beginning in the Nineteenth Century the federal government and nearly every state established civil service systems under which employment decisions were to be based upon rational criteria. The push for civil service systems was part of a reform movement to end political patronage and improve governmental equity and efficiency. Collective Bargaining & Civil Service in Public Employment: Conflict and Accommodation. Inst. of Industrial Relations, U.C. Berkeley (1976). The civil service laws set up substantive policy and procedures under which public employees could be disciplined and terminated only for legitimate work-related cause.

Today the merit principle and its fundamental precepts are generally accepted as the appropriate basis for government employment and have been widely applied, including in Colorado. See, e.g. C.R.S. 324-34-402.5 (unfair employment practice to terminate employment due to off-premises lawful activity).

Simply defined, the merit principle is defined as the concept that public employees should be selected on the basis of merit, while the merit system is described as a public employment procedure designed to implement the merit principle. 1967 National Governors' Conference, Report of Task Force on State and Local Government Labor Relations, Chicago: Public Personnel Association (1967). Such procedures minimally include: impartial recruiting; an examining and selecting program; a position classification plan based on duties and responsibilities; promotion based on merit; and protection against arbitrary disciplinary action. David J. Stanley, "What Are Unions Doing to Merit Systems?" Public Personnel Review, (April 1970).

Completely contrary to these principles, Amendment 2, will permit employers to base employment decisions regarding gay, lesbian and bisexual employees purely on their sexual orientation. This result is repugnant to the current system which requires that employment decisions be based upon rational criteria which reward meritorious employees and is contrary to an efficient and effective governmental service.

B. The Evolution of Anti-Discrimination Laws

During this century we have also witnessed the rise of laws and legal authority which prohibits discrimination in employment based upon characteristics such as race, gender, color, ethnic origin, handicap, age and sexual orientation. None of these

characteristics have any relation to the ability of an individual to perform their work. Similar to the passage of civil service systems, this development in employment law has served to remove irrational, non-work related characteristics and criteria from employment decisions. The federal government and nearly every jurisdiction in the nation currently has statutes, ordinances, rules or regulations prohibiting employment based upon race, gender, color, handicap and age.^{8/} Legal prohibitions against

^{8/} The process of increased employee protection against employment discrimination is apparent in our federal legislation. For example, in 1964, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq. was passed prohibiting employment discrimination based on race, color, religion, sex and national origin. In 1967 the Age Discrimination In Employment Act, 29 U.S.C. §§621-634 (1979 & Supp. III 1979) was enacted protecting persons of certain ages from employment discrimination. In 1990 Congress promulgated The Americans With Disabilities Act, 42 U.S.C. §12101 et seq., which prohibits employers from discriminating against individuals with disabilities.

employment discrimination based on sexual orientation are becoming increasingly common.^{9/}

There is an undeniable evolution in our laws to provide protection against employment discrimination to groups of individuals in our society who have historically been the target of discrimination. Laws prohibiting sexual orientation discrimination fall within this tradition.

There is a developing body of case law finding that discrimination against gays, lesbians and bisexuals violates our nation's fundamental values. Van Ooteghem v. Gray, 628 F.2d 488, 49093 (5th Cir. 1980); Bemer v. Middendorf, 632 F.2d 788 (9th Cir. 1980); Singer v. U.S. Civ.Serv.Comm'n, 530 F.2d 247 (9th Cir. 1976), vacated and remanded, 429 U.S. 1034 (1977); Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1976); Acanafora v. Board of

^{9/} Wisconsin, Massachusetts, Hawaii, Connecticut, California, the District of Columbia and Minnesota have adopted sexual orientation anti-discrimination provisions. Wis. Stat. Ann §§101.22 et seq., 111.31, .32, .36 & .70 & 942.04 (see also Wis. Stat. Ann. §66.395 & 66.4325); Mass. Gen. Laws ch. 151B (employment (employment (employment and housing), chs. 92A & 98 (public accommodations; Hawaii Rev. Stat. §§368-1 & 378-1 (as amended by 1991 Hawaii Act 2, signed by Governor John Waihee March 21, 1991); Connecticut Public Act No. 91-58 (signed by Governor Lowell Weicker in April 1991); D.C. Human Rights Act, D.C. Code §1-2512; Cal. Civ. Code §51.7 (1973). On April 2, 1993, the Governor of Minnesota, Arnie Carlson, signed into law an Act that prohibits sexual orientation discrimination in employment.

Hundreds of local jurisdictions and governmental entities across the nation have passed laws prohibiting sexual orientation discrimination. Various jurisdictions in Colorado have also enacted provisions banning sexual orientation discrimination. (See above at pp. 2-3 for a listing of these provisions).

Educ. of Montgomery County, 491 F.2d 498 (9th Cir. 1974); Norton v. Macy, 417 F.2d 1161, 1164 (D.C. Cir. 1969); Ben Shalom v. Secretary of Army, 489 F.Supp. 964 (E.D. Wis. 1980); Morrison v. State Bd. of Educ., 461 P.2d 375 (Cal. 1969).

The January 15, 1993, Opinion and Order of the District Court is consistent with the clear evolution of employment law. In particular, the Court found that there is an abiding constitutional principle, supported by a long line of cases which provides that the Equal Protection Clause of the United States Constitution forbids state endorsement of private prejudice.^{10/}

The evolution of employment law has been characterized by

^{10/} The cases cited by the Court include: Reitman v. Mulkey, 387 U.S. 369, 18 L.Ed.2d 830, 87 S.Ct. 1627 (1967); Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct. 1879 (1984); Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 87 L.Ed.2d 313; 105 S.Ct. 3249 (1985). Transcript of Opinion and Order, p. 24-28.

In addition, the Courts Opinion and Order is supported by numerous other cases in which courts have refused to permit state action endorsing private discrimination. In U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 37 L.Ed.2d 782, 93 S.Ct. 2821 (1973), the Court held that a provision under which food stamps could not be issued to households of unrelated persons violated the Due Process Clause of the Fifth Amendment. The Court found that the purpose of the provision was to prevent a politically unpopular group, so-called "hippies" from participating in the food stamp program and such a purpose could not constitute a legitimate governmental interest. Id. at 413 U.S. 534.

In Turley v. Adel Community School District, 402 F.Supp. 402 (S.D. Iowa 1971) the Court ordered the reinstatement of a student expelled from school due to the length of his hair. The Court held:

Community prejudices and stereotypes are not permissible criteria for classifying citizens under the Fourteenth Amendment...

(Continued)

the removal of an expanding number of status-based traits from employment decisions. This evolution has generally produced a more efficient and fair American workplace under which individual merit and not status, is the proper focus of the employment relationship.

C. Impact of Amendment 2 On Collective Bargaining

AFSCME serves as the collective bargaining representative for 1.3 million members and is involved in thousands of collective bargaining agreements, including agreements with Colorado public employers. Since the early 1960's AFSCME has encouraged the inclusion, through collective bargaining, of anti-discrimination provisions into its collective bargaining agreements. During this time period, there has been a gradual process under which new groups of employees have been included in the negotiated anti-discrimination provisions.

At first the anti-discrimination provisions covered only race, color, gender and ethnic origin. Then the provisions were expanded to cover other forms of employment discrimination such as age, handicap and sexual orientation discrimination. During the past fifteen years AFSCME has negotiated collective bargaining agreements which include sexual orientation anti-discrimination provisions covering tens of thousands of employees. In Colorado, a similar process of expanding the coverage of provisions prohibiting discrimination has occurred.

Amendment 2 will prohibit AFSCME from continuing to bargain sexual orientation anti-discrimination provisions in its collective bargaining agreements in Colorado. Such a prohibition is contrary to the progressive direction of collective bargaining which has been to expand anti-discrimination provisions in order to protect employees and permit more efficient and rationale employment decisions.

In addition, nearly all AFSCME collective bargaining agreements, including AFSCME Colorado collective bargaining agreements, contain provisions which prohibit employee discipline or termination unless the employer has good cause. Such provisions rationalize employment practices and prohibit irrational and arbitrary employment actions. However, under Amendment 2 employers may discipline or terminate a gay, lesbian or bisexual employee because of the employee's sexual orientation and the just cause provisions in the collective bargaining agreement will not be enforceable. Accordingly, Amendment 2 may nullify substantial provisions in our collective bargaining agreements that have been bargained in good faith with public employers.

In addition, private sector collective bargaining agreements will be impacted by Amendment 2. Similar to the public sector agreements, private sector collective bargaining agreements also include provisions prohibiting discrimination, including sexual orientation discrimination. Under Amendment 2 provisions

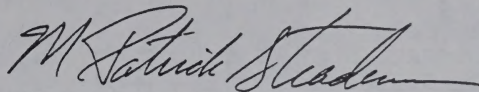
covering sexual orientation discrimination may ultimately be unenforceable since arbitration awards upholding such provisions may not be enforceable in the Colorado courts.

In conclusion, the evolution of employment law and practice has involved the progressive elimination of non-work related characteristics and criteria in employment decisions and the increasing application of employee merit and job performance as the basis for employment decisions. This evolution is readily apparent in the rise and development of the civil service system in public employment and in the enactment of laws and the negotiation of provisions in collective bargaining agreements prohibiting employment discrimination and termination without cause. One of the outcomes of this evolution has been the creation of a fairer and more efficient workplace. Amendment 2 is profoundly inconsistent with the developments of modern employment law and would constitute a return to the dark past where the current unpopular status of individuals with particular characteristics, becomes a driving force in employment decisions.

CONCLUSION

For the reasons set forth above AFSCME respectfully requests that the opinion of the District Court be affirmed.

Respectfully submitted this 3rd day of May, 1993.



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